M&M Backhoe Service, Inc. *and* International Union of Operating Engineers Local 487, AFL–CIO. Cases 12–CA–22384, 12–CA–22404, 12–CA–22450(1–5), and 12–CA–22458

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 10, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to amend the remedy,[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by photographing picket-line activity, Member Schaumber observes that there was no showing that the Respondent photographed the picketers in order to document unlawful activity, such as trespass.

[2] We amend the remedy section of the judge's decision to provide that the make-whole remedy for the Respondent's unlawful unilateral change in the way it compensated employees for overtime is to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Chairman Battista and Member Schaumber note that the judge provided for an instatement and backpay remedy pursuant to *J.E. Brown Electric*, 315 NLRB 620, 622–623 (1994), for the Respondent's unlawful unilateral cessation of use of the Union's hiring hall. Chairman Battista and Member Schaumber find it unnecessary now to address issues concerning the validity of that decision. See concurring opinions in *Brown* and in *Coulter's Carpet Service*, 338 NLRB 732 (2002); see also dissenting opinions in *M. J. Wood & Associates*, 325 NLRB 1065, 1068 fn. 9 (1998); *Baker Electric*, 317 NLRB 335, 336 fn. 4 (1995).

We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

1. In finding that the 8(f) bargaining relationship between the Respondent and the Union validly converted to a 9(a) relationship, the judge applied the approach set forth in *Staunton Fuel & Material*, 335 NLRB 717, 719–720 (2001), pursuant to which an agreement that meets certain requirements is independently sufficient to establish a union's 9(a) status. The viability of this approach was challenged by the United States Court of Appeals for the District of Columbia Circuit's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). In *Nova Plumbing*, the D.C. Circuit denied enforcement where the Board had relied solely on contract language to find 9(a) status "despite strong record evidence that the union may not have enjoyed majority support." Supra at 533. Here, however, the record evidence clearly demonstrates that the Union enjoyed majority support at the time that the recognition agreement was executed. Thus, we need not reassess here the rule of *Staunton Fuel & Material* because the result in this case would be the same under *Nova Plumbing*.

2. The General Counsel excepts to the judge's recommended Order on the ground that, in ordering a make-whole remedy for the Respondent's unilateral cessation of payments into the Union's health and welfare fund, the judge failed also to order a like remedy for the Respondent's cessation of payments into the Union's pension, apprenticeship, and vacation funds. The General Counsel observes that the Respondent stipulated that it ceased making payments into all four of these funds after June 2002. The General Counsel requests that the Board modify the judge's findings of fact, conclusions of law, and recommended Order accordingly.

We decline to grant the General Counsel's exception. It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is. Here, although the complaint specifically alleged that "[s]ince on or about July 1, 2002, Respondent has ceased remitting health and welfare fund contributions," the complaint did not similarly allege that the Respondent unlawfully ceased payment into the pension, apprenticeship, or vacation funds. Further, the General Counsel never sought to amend the complaint to include these allegations, nor were these issues litigated at the hearing. Accordingly, the Respondent was not on notice, at the time of the stipulation the General Counsel invokes, that its cessation of payments into those three funds was at issue. Under these circumstances, the Respondent's cessation of payments into these additional union funds was not fully and fairly litigated. See *Mine Workers District 29*, 308 NLRB 1155, 1158 (1992) (mere presentation of evidence relevant to a possible violation of the Act does not satisfy the requirement that matter be "fully and

fairly litigated"). Unlike our colleague, we find that the generalized language in the complaint, alleging that the Respondent "changed other terms and conditions of employment," is too vague to put the Respondent on notice that its contributions to the pension, apprenticeship, and vacation funds were at issue, particularly given that the complaint specifically alleged cessation of payments into the health and welfare fund and omitted mention of any other union fund.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, M&M Backhoe Service, Inc., Homestead, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully withdraw recognition from the International Union of Operating Engineers Local 487, AFL–CIO and refuse to bargain with it as the exclusive collective-bargaining representative of the employees in the unit described below.

WE WILL NOT unilaterally cease to pay daily and Saturday overtime.

WE WILL NOT unilaterally fail and refuse to use the Union's hiring hall to hire employees.

WE WILL NOT unilaterally cease to pay health and welfare benefits on your behalf.

WE WILL NOT fail and refuse to provide the Union with requested relevant information.

WE WILL NOT promise you benefits to persuade you to withdraw your support from the Union and WE WILL NOT threaten any of you with termination for continuing to support the Union.

WE WILL NOT solicit you to sign a petition requesting that we withdraw recognition from the Union.

WE WILL NOT photograph lawful strike activity.

WE WILL NOT reprimand or suspend any of you for engaging in lawful strike activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of the rights set forth above.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Equipment Operators, Oilers, Drivers and Equipment Mechanics employed by the Employer in the counties of Broward, Charlotte, Collier, Miami-Dade, Glades, Hendry, Highlands, Indian River, Lee, Martin, Okeechobee, Palm Beach and St. Lucie, Florida; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL make you whole, with interest, for any losses you suffered because we unlawfully ceased paying daily and Saturday overtime.

[3] Member Liebman would grant the General Counsel's exception. She would find that the Respondent's cessation of payments into the Union's pension, apprenticeship, and vacation funds was both closely related to its refusal to pay into the health and welfare fund and, contrary to the majority's view, fully and fairly litigated by the parties. The Respondent stipulated that it stopped paying into all four union funds. Moreover, the complaint provision alleging cessation of payments to the health and welfare fund on or about July 1, 2002, also alleged that "on or about the same date and thereafter, the Respondent changed other terms and conditions of employment of employees in the Unit." Thus, when the Respondent stipulated that it ceased payment into all four of the funds on July 1, 2002, it was on notice that all its unilateral changes on that date were at issue.

WE WILL offer immediate and full employment to those applicants who would have been referred to us by the Union's hiring hall were it not for our unlawful conduct, and make them whole, with interest, for any losses suffered as result of our failure to hire them.

WE WILL make you whole for any losses you suffered as a result of our unlawful failure to make contributions to the Union's health and welfare fund by making all delinquent contributions to the fund, including any additional amounts due the fund, and by reimbursing you, with interest, for any expenses you incurred as a result of our failure to make those contributions.

WE WILL provide the Union in a timely manner with the information it requested by letters dated June 27 and July 12, 2002: our current contract with Florida Power & Light, the 401(k) and health care plans we provide to both bargaining unit and non–bargaining unit employees, and the names, addresses, and phone numbers of any employees we hired to operate equipment who were not referred by the Union, together with their wage rates, fringe benefits, paid holidays, paid vacation, and/or any other benefits or compensation being provided or promised in the future, all of which information is necessary and relevant to the Union's duties as collective-bargaining representative of employees in the unit described above.

WE WILL make Eddie Falcon whole, with interest, for any loss of earnings and other benefits suffered by him as a result of his unlawful suspension for engaging in strike activity.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued to Tommy Miliano and Eddie Falcon, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

M&M BACKHOE SERVICE, INC.

Shelley B. Plass, Esq., for the General Counsel.
Michael E. Avakien, Esq., for the Respondent.
Mr. Gary Waters and *Susan Mohorcic, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on April 8, 9, and 10, 2003, pursuant to a consolidated complaint that issued on November 25, 2002.[1] The complaint alleges several violations of Section 8(a)(1) of the National Labor Relations Act (the Act), the warning of one employee and the warning and suspension of two employees in violation of Section 8(a)(3) of the Act, and failure to provide relevant information, various unilateral changes, and the withdrawal of recognition from the Union in violation of Section 8(a)(5) of the Act. The Respondent's answer denies any violation of the Act. I find that the Respondent did violate the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, M&M Backhoe Service, Inc. (the Company) is a Florida corporation engaged in the building and construction industry from its facility at Homestead, Florida. The Company, in conducting its business, annually purchases and receives at its facility goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union of Operating Engineers Local 487, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Robert E. Miley, president of the Company, is a former member of the Union. He founded the Company in 1991. From 1992 until June 30, 2002, the Company entered into successive 8(f) agreements with the Union. The appropriate unit is:

> All full-time and regular part-time Equipment Operators, Oilers, Drivers and Equipment Mechanics employed by the Employer in the counties of Broward, Charlotte, Collier, Miami-Dade, Glades, Hendry, Highlands, Indian River, Lee, Martin, Okeechobee, Palm Beach and St. Lucie, Florida; excluding all other employees, guards and supervisors as defined in the Act.

Although entering into successive agreements, the Company had, in recent years, expressed some reluctance in continuing its 8(f) relationship. In 2001, President Miley advised Union Business Manager Gary Waters that the Company would not sign another agreement. The Union obtained authorization cards from the unit employees but, upon Miley's agreement to bargain, did not seek an election or recognition. Thereafter, the parties entered into an 8(f) contract that expired on June 30,

[1] All dates are in 2002 unless otherwise indicated. The charge in Case 12–CA–22384 was filed on July 25. The charge in Case 12–CA–22404 was filed on July 29. The charges in Cases 12–CA–22450(1-4) were filed on August 20, and the charge in Case 12–CA–22450(4) was amended on September 30. The charge in Case 12–CA–22450(5) was filed on August 28. The charge in Case 12–CA–22458 was filed on August 27.

2002.

The instant case relates to events preceding and following the expiration of the foregoing contract. Critical to the issues herein is whether, on April 4, the 8(f) relationship between the parties was converted to a 9(a) relationship.

B. The 9(a) Status

On March 26, President Miley wrote Business Manager Waters stating that the Company "will not be reentering into contract negotiations . . . when our existing contract expires at midnight June 30th." Upon receipt of that letter, Business Manager Waters directed Union Business Agent James Allbritton to obtain authorization cards from the unit employees. At that time, the unit consisted of 17 employees. At the hearing, the General Counsel introduced 17 authorization cards signed by the unit employees on March 28 and 29.

On March 28, Business Agent Allbritton went to the facility in order to obtain authorization cards from the employees. He met shop steward Phil Gambill, who introduced him to the employees as they began arriving at work. Allbritton presented the authorization cards to the employees stating that it looked as if Miley was not going to sign a contract and so the Union needed to get the representation cards signed. Gambill recalls Allbritton stating that "as usual Bob [Miley] is being a pain in the ass about the contract this year" and that he needed to get "the representation cards filled out so we can get on with the contract." Some employees did specifically ask about the cards and, when asked, Allbritton explained that the cards "showed that the Union represented them" and that "we may need to file [for] an election, so we can use the card for that." There is no evidence challenging the authenticity of the authorization cards signed by the 17 unit employees which were received in evidence without objection.

On March 29, Waters wrote Miley, enclosing two copies of a recognition agreement. In pertinent part, the letter stated:

> Enclosed please find two copies of a recognition agreement.
>
> We have determined it is in the best interest of the Union, and your employees currently represented by this Union, to provide your firm with affirmation that a majority of your employees have authorized the Union to represent them in collective bargaining. Therefore, we are seeking to gain voluntary recognition from your firm and 9(a) status under the National Labor Relations Act. We will make available for your review, representation authorization cards signed by a majority of your employees.
>
> Alternative to attaining 9(a) status by voluntary recognition, we may petition the National Labor Relations Board for a representation election. As this would be time consuming and inconvenient for both of us, we hope you will agree to voluntary recognition.
>
> Please sign and date one copy of the agreement and return it to this office.

By letter dated April 2, President Miley responded stating that the Company "is willing to sit down and collective bargain under Section 9(a)."

By memorandum dated April 4, Business Manager Waters responded to Miley's letter stating:

> Thank you for offering to meet to negotiate a new collective-bargaining agreement. However, in order to change our bargaining relationship from 8(f) to 9(a) status under the National Labor Relations Act, you must voluntarily recognize that the union has majority status by signing the previously provided agreement or by a representation election conducted by agents of the NLRB.

Waters concluded by noting that he had unsuccessfully attempted to reach Miley by telephone and that, if he heard nothing further, the Union would file a representation petition.

Later that day, April 4, President Miley admits that he signed and dated, and sent to the Union by facsimile, the Recognition Agreement which provides as follows:

> The Union claims, and the Employer acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining.
>
> The Employer hereby recognizes the Union as the exclusive bargaining agent under Section 9(a) of the National Labor Relations Act of all full-time and regular part-time Equipment Operators, Oilers, Drivers and Equipment Mechanics on present and future jobs sites within the jurisdiction of the Union.

Although the Union had, on March 29, advised the Company that it would "make available for your review, representation authorization cards signed by a majority of your employees," Miley never requested to see the authorization cards. Miley was aware that Allbritton had come to the facility. Superintendent William Loy, who had greeted and shook hands with Allbritton on March 28, knew that he was soliciting authorization cards. It is clear that Miley was satisfied that the Union did possess authorization cards from a majority of the employees since, on April 4, he signed the Recognition Agreement which states that "the Employer acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining." Notwithstanding Miley's failure to avail himself of the offer to review the authorization cards, Business Manager Waters testified that, on April 11, he directed Business Agent Allbritton to carry a manila envelope containing copes of the cards to the Company. Allbritton testified that he presented the manila envelope to Office Manager Jan Pfrenger. Pfrenger denied receiving the package and Miley testified that he never received it. The foregoing contradictory testimony need not be resolved since Miley neither requested to review the cards nor disputed their existence or authenticity.

Regarding the validity of those cards as designations of the Union as the employees' collective-bargaining representative, there is no evidence challenging the validity of the cards signed by the following nine employees: Phil Gambill, Bob Leininger, Tommy Miliano, Joe Spear, Lon Chatman, Chris Sanchez, Eddie Falcon, Luke Tease, and Alex Rohling.

The Company presented eight employee witnesses who testified regarding the circumstances surrounding the signing of their cards.

Employee Dennis Coates testified that Allbritton said something about the card "helping us." He recalled that "everybody was kind of in a bunch and he [Allbritton] wanted everybody to sign the card, and we just signed it." Coates read the card before he signed it.

Employee Daniel Collins, although denying that he read the card, acknowledged that he filled out all the information on the card and signed it. He testified that Allbritton asked the employees to sign the cards but did not explain anything about the card.

Francisco Ocasio recalled that Allbritton asked him to sign the card stating that "it was for our benefits." Although acknowledging that he filled out all of the information on the card, he denied reading it.

Marcos Falcon testified that Allbritton came to the facility, passed out cards and said, "[H]ere, sign it." Although Falcon testified that he could not read the print on the card that was presented to him on the witness stand because he did not have his glasses, when asked whether he had his glasses when signing the authorization card Falcon avoided a direct answer, testifying, "I don't usually carry it [them] because I break them all the time." Falcon did not deny reading the card and acknowledged that he was aware that the card "was something from the Union, . . . I belong to the Union, I just took it and signed it."

Former employee James Ferguson recalls that he was approached by an individual whom he did not know, but whom he identified at the hearing as being Business Agent Allbritton. He recalls that Allbritton passed him a card and said to sign it, that he saw "everyone else sign it so I signed it too." Although denying that he read the card, Ferguson acknowledged identifying the Union logo on the top of the card and testified, "I knew what it was for."

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court stated:

> Under the *Cumberland Shoe* doctrine, [*Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1975)] if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election. [Id. at 584.]
>
> . . . .
>
> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. [Id. at 606.]

The failure of a card signer to read the authorization card, the purpose of which was not misrepresented, does not affect the validity of the authorization. *Keystone Pretzel Bakery*, 242 NLRB 492, 493 (1979).

None of the foregoing employees testified to any misrepresentation by Allbritton or Gambill. The cards are single purpose cards authorizing the Union "to represent me for the purpose of collective bargaining." I find that all of the foregoing cards constitute valid designations of the Union as the employees' collective-bargaining representative.

Jorge Deulofeu testified that Allbritton told him to sign the card "to see how many people were in the Union." He denied that he read the card, although he does read English. He recalled that, when he filled out and signed the card, he did so on a vehicle. A laborer, who was not in the unit, was with him. He denied giving a card to his father.

Steward Phil Gambill confirmed that Allbritton gave the card to Deulofeu. Gambill observed that Alejandro Deulofeu, the father of Jorge Deulofeu, was not at work and requested that Jorge, his son, take him a card and "get it back to me." Jorge agreed to do so. Gambill testified that Jorge returned the card to him the following day.

Alejandro Deulofeu, who is not fluent in English, testified through an interpreter. He acknowledged filling out and signing the union authorization card bearing his signature and dated March 28. Although testifying that he could not remember who gave the card to him or to whom he returned it, he did recall that his son told him that it was a paper to "see how many people were signed up with the Union." In an affidavit provided to the Company on August 16 and witnessed by Office Manager Jan Pfrenger, Alejandro Deulofeu states that Allbritton gave him the card, but this simply is incorrect since he was not at work. The affidavit then states that his son, Jorge Deulofeu, told him that the card "meant that I selected the Union to represent me in bargaining," and that, had he known what the card meant when he signed it, he would not have done so. There is no explanation regarding how the card admittedly signed by Alejandro Deulofeu, who was not at work, came into the Union's possession other than by Jorge Deulofeu having complied with Gambill's request that he take the card to his father, have his father sign it, and return the card. Alejandro Deulofeu's affidavit explicitly contradicts his testimony regarding what his son told him and implicitly contradicts the testimony of Jorge Deulofeu that Allbritton told him that the card was "to see how many people were in the Union."

"When a card signer is illiterate, or has no ability in English, it must be established that the card signer knew what he was signing and in fact authorized the Union to represent him." *Brancato Iron Works, Inc.*, 170 NLRB 75, 81–83 (1968). There must be evidence that the card was translated or explained so that the card signer "understood the meaning and purpose of an authorization card." Unless it is established that the signer intelligently designated the Union as collective-bargaining representative, the card in question "cannot be counted toward establishing the Union's majority support." *Food Cart Market*, 286 NLRB 1016, 1017 (1987). I find, consistent with Gambill's credible testimony, that Jorge Deulofeu took the card to his father. Alejandro Deulofeu's affidavit states that his son explained that the card "was for the Union to represent him in bargaining," and he never repudiated that statement. Upon receiving that explanation, the same explanation that I find Jorge received from Allbritton, Alejandro signed the card. Jorge returned the card to Gambill. Alejandro Deulofeu went to Cuba

for 17 days on March 29, returning in mid-April. I find that the cards signed by Jorge and Alejandro Deulofeu constitute valid designations of the Union as their collective-bargaining representative.

Angel Ocasio testified that Allbritton asked him to sign a card, that he told Allbritton that he needed to go to his truck and get his glasses so that he could read it, that Allbritton told him, [N]o, we had to sign it." Thereafter, Ocasio elaborated, testifying that Allbritton also stated that he would let Ocasio use his glasses and that he actually tried them on but "it didn't work." Ocasio denied filling out the additional information on the card, testifying that he does not write English well. Allbritton denied filling out the additional information. I am inclined to credit Allbritton, but I need not make this credibility resolution since, even without Ocasio's card, the Union is shown to have been authorized as the unit employees' collective-bargaining representative by valid cards signed by 16 of the 17 unit members.

Giving the Company the benefit of any doubt, the validity of only one card, that of Angel Ocasio, who, notwithstanding the purported absence of his glasses, was able to sign his name at the appropriate space on the authorization card, is even questionable. Thus, I find that a majority, 16 of 17 of the employees in the unit at the time Miley signed the Recognition Agreement on April 4, had designated the Union as their collective-bargaining representative.

Thus, the only issue is the efficacy of the Company's recognition of the Union and whether that recognition converted the 8(f) relationship to a 9(a) relationship. If, as the Respondent argues in its brief, Miley simply did what Waters told him he needed to do "in order for the Union to continue to bargain with M&M," the obvious question is what motivated Miley, who on March 26 had stated he was not going to bargain, to agree to bargain. The answer to the foregoing question is equally obvious. He received the letter from Waters requesting that the Company voluntarily recognize the Union and stating that, if the Company would not agree to do so, the Union would petition for an election which would be "time consuming and inconvenient for both of us." Insofar as Miley relied upon what Waters told him, he relied upon the representation, a representation that the record establishes was truthful, that the Union had obtained authorization cards from a majority of the employees in the unit and would petition for an election if the Company did not voluntarily recognize the Union.

The Respondent argues that there was no meeting of the minds regarding recognition. That argument simply ignores the facts. Miley had, on March 26, informed the Union that he would "not be reentering into contract negotiations." Miley's testimony concerning his purported lack of understanding regarding the Recognition Agreement that he signed was unconvincing. Regardless of Miley's purported ignorance of 9(a) status, he had to understand after receiving Waters' letter of March 29 and memorandum of April 4 that, unless the Company agreed to voluntarily recognize the Union, the Union was going to petition the National Labor Relations Board for a representation election. The Respondent's brief does not set out the contents of either of those communications. Miley, on April 4, signed the Recognition Agreement. His assertion that he thereafter attended the bargaining sessions with the Union and three other contractors in June "because I wanted to hear what the rest of them had to say," rather than because the Company had recognized the Union, was incredible and is contradicted by his admission that he actually entered into negotiations. The Recognition Agreement that Miley admittedly read and signed clearly states its purpose. As the General Counsel points out, citing *Hayman Electric*, 314 NLRB 879, 887 (1994), a case involving multiple unions and employers, "[t]here was no purpose in the Unions demanding recognition based on majority status and the Respondents signing of recognition agreements if all that was intended was to preserve the existing 8(f) relationships."

The Board, in *Staunton Fuel & Material*, 335 NLRB 717 (2001), adopting the approach of the Court of Appeals for the Tenth Circuit, held that an 9(a) relationship is established where "(1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support." Id. 720. The Board noted that "the union's required request for recognition can be fairly implied from the contract language stating that the employer grants the required recognition" and that "the employer's grant of recognition must be express and unconditional." Regarding majority support, the Board noted the inadequacy of statements to the effect that "the union 'represents' a majority of unit employees" or that a majority of employee "are members" of the union. Ibid. The Respondent's brief does not set out the Recognition Agreement herein which states that "the Employer acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining" I find that the foregoing clear statement constitutes the required acknowledgement of majority support. There is no question that the Union had valid authorization cards from at least 16 of the 17 employees in the unit. The Company never questioned or disputed the Union's majority status. Following his execution of the Recognition Agreement, Miley entered into negotiations with the Union. I find that the Union attained 9(a) status on April 4.

C. The Unfair Labor Practice Allegations

1. The 8(a)(5) allegations

a. The information requests

Following the grant of recognition, the Union requested negotiations on April 9. Thereafter, the parties met twice, on June 5 and 11, in joint negotiations with the Company and three other companies. The three other companies agreed to increased contributions to the contractual health and welfare fund. M&M Backhoe did not agree. Although President Miley testified that the Company raised issues related to the referral of unqualified individuals by the Union, all written proposals exchanged were economic. On June 20, Waters wrote Miley, noted the agreement to which the Union and the three other companies had come, and requested a counter offer. On June

21, Miley made a counter offer, with no mention of any matter other than economic issues, in which he referred to the Company's contract with Florida Power & Light "that is binding" and concluding that "any increase at this time would be cost prohibitive."

On June 27, Waters wrote Miley requesting, among other information, the current contract between the Company and Florida Power & Light and "[a]ll information pertinent to 401K and health care plans provided to both bargaining unit employees and nonbargaining unit employees." The letter was sent by facsimile and mail.

On July 8, Miley asked a local attorney to call Business Manager Waters and tell him that the Company was "through with negotiations" and that the information the Union had requested on June 27 would not be provided. Whether the attorney did so or, as Waters testified, agreed to review the contracts into which the other contractors had entered is immaterial since it is undisputed that the information was not provided. The Respondent argues that the requested information was not presumptively relevant since Miley's assertion that increased health and welfare contributions were "cost prohibitive" did not specifically assert an inability to pay. In this regard, I note that the Union's information request of June 27 also included a request for profit-and-loss statements, but the failure to provide that information is not alleged in the complaint. Insofar as Miley specifically cited the Company's "binding" agreement with Florida Power and Light in his counter offer, that document was clearly relevant. Similarly, documents reflecting the cost of noncontractual health benefits and other benefits being provided by the Company, such as the requested 401(k) plan, were clearly relevant to negotiations in view of the Company's resistance to increases in contributions to the contractual health and welfare plan. By failing to provide the foregoing information, the Respondent violated Section 8(a)(5) of the Act.

In early July, after expiration of the contract, the Company hired new employees not referred by the Union. On July 12, Business Manager Waters wrote Miley requesting "the names, addresses, and phone numbers of any and all newly hired employees engaged in the operation of equipment for your firm. Additionally, please provide information regarding the wage rates, fringe benefits, paid holidays, paid vacation and/or any other benefits or compensation being provided, or promised in the future, to said employees."

The Respondent made no reply to the foregoing request. Information relating to employees performing bargaining unit work is presumptively relevant. By failing to provide the foregoing information, the Respondent violated Section 8(a)(5) of the Act.

On August 12, the Union called a strike. The Union advised the Company of the names of the employees who struck. Thereafter, the Company disciplined three of the strikers. On August 20, Attorney Kathleen M. Phillips wrote the Company on behalf of the Union requesting, among other information, all documents relating to the discipline imposed, copies of the employees' personnel files, and any documents relied upon in imposing discipline. On August 29, Attorney Michael E. Avakian responded to Phillips stating that the agreement between the Union and Company expired on June 30 and that "it is the Company's position that it would be a violation of Section 8(a)(2) and 301(c)" of the Act to provide the requested information."

The foregoing response, predicated upon the expiration of the contract, did not mention the Recognition Agreement or assert that the Union was no longer supported by a majority of the employees. There is no claim that information relating to the discipline of represented employees is not relevant. By failing to provide the requested information, the Respondent violated Section 8(a)(5) of the Act.

b. The unilateral changes

The complaint alleges that the Respondent unilaterally, without notice to or bargaining with the Union, changed overtime pay, ceased using the hiring hall and hired employees not referred by the Union, and ceased remitting health and welfare fund contributions.

At the hearing, it was stipulated that, after June 30, the Respondent ceased paying overtime for work in excess of 8 hours in a single day and ceased paying overtime for work on Saturday unless that work exceeded 40 hours. Under the contract, all hours over 8 in a single day and all Saturday work were compensated as overtime. The Respondent's answer admits the cessation of use of the hiring hall and of remission of health and welfare benefits.

Once the employees' collective-bargaining representative attains 9(a) status, an employer is not privileged to unilaterally alter the terms and conditions of the employees' employment. Overtime compensation is a term and condition of employment that may not be altered absent bargaining. Hiring hall procedures are an existing practice that an employer may not change unilaterally. *American Commercial Lines*, 291 NLRB 1066, 1075 (1988). The unilateral failure to continue to make contractual health and welfare fund contributions also violates the Act. *Decorative Floors, Inc.*, 315 NLRB 188, 189 (1994). The foregoing three unilateral changes made by the Respondent violated Section 8(a)(5) of the Act.

c. The withdrawal of recognition

The complaint alleges that the Company unlawfully withdrew recognition from the Union on August 29, the date of Attorney Avakian's letter. The Respondent argues that it had no bargaining obligation upon expiration of the 8(f) agreement on June 30 and further contends that the Union did not represent a majority of its employees.

I have found that the Recognition Agreement executed on April 4 established a 9(a) relationship between the parties, thus, the 8(f) contract became a 9(a) contract. *VFL Technology Corp.*, 329 NLRB 458 (1999). Upon the expiration of a 9(a) contract, a Union's majority status is presumed to continue.

The Company argues that it obtained "actual knowledge of the [U]nion's minority status" on the basis of expressions of dissatisfaction with the Union by various employees. Only one employee, Isaias Ocasio, expressed dissatisfaction to President Miley and, because of the manner in which Ocasio spoke, Miley misunderstood what he said. Ocasio was hired upon referral by Local 487 in May. Ocasio acknowledged that he stated to Miley that he was "not supporting the Union at all."

Ocasio's testimony reveals that, although he referred to "the Union," he was actually expressing dissatisfaction with his former local, Local 925, not Local 487. Miley testified that he also heard of employee dissatisfaction from Loy. He testified to only one such conversation and, although initially placing this conversation at the time of negotiations, he then placed it in late March, "during right after the time that Jimmy Allbritton had come in."

Superintendent Loy testified that he reported to Miley, in late March, which would have been prior to execution of the Recognition Agreement on April 4, that a majority of the unit employees did not wish to be represented by the Union. According to Loy, Miley, in late March, informed him and the other foremen that he did not intend to sign another contract with the Union and that he, Loy, responded that "we," referring to himself and the other foremen, "felt that the majority of the operators did not want representation by the Operating Engineers." The foregoing statement is the extent of Loy's representation. He named no employees. His statement was made on the basis of comments that he testified various employees had made to him that expressed dissatisfaction with Local 487, all of which, according to Loy, included the statement that the employee did not want to be represented by the Union. Loy testified to such comments by a total of 10 employees, one of whom was Luke Tease who engaged in the strike against the Company in August. Loy named only seven employees who expressed dissatisfaction with the Union prior to April 4 when President Miley signed the Recognition Agreement, thus his reference to a "majority" was inaccurate. According to Loy, those employees were Danny Collins, Dennis Coates, Joe Spear, Marcos Falcon, Luke Tease, and Angel and Frank Ocasio.

The Respondent argues in its brief that a majority of the unit employees informed Loy that they did not want the Union to represent them and that Loy informed Miley of this, but the Respondent fails to note that their only conversation established by the evidence occurred, according to Loy, in late March, and according to Miley "right after the time that Jimmy Allbritton had come in." At that time, Loy could have only spoken with eight of the 10 employees he named. The conversation he reported with Jorge and Alejandro Deulofeu included reference to Allbritton's solicitation of authorization cards, and it, therefore, had to have occurred after Alejandro, who had not been at work when the cards were signed, returned from Cuba in mid-April. Although Loy testified that he spoke with employee James Ferguson in June, Ferguson testified that he spoke with Loy shortly after signing the authorization card. Loy stated that the card was for the Union to represent him, and Ferguson responded that he did not "need no representation." The foregoing comment relating to "need" is ambivalent at best and does not establish that Ferguson did not want representation, an inference consistent with the absence of any action by Ferguson to revoke the card. Thus, regardless of the date of that conversation, Loy could not have received statements of dissatisfaction from a majority of the employees.

Loy asserted, as if by rote, that each employee with whom he spoke stated that he "did not want the Operating Engineers to represent him." I do not credit that testimony. Only Collins and Coates testified to making such a statement. I find that Loy interpreted any statement of dissatisfaction as a statement that the employees did not wish to be represented. "[E]vidence of dissatisfaction bears only indirectly on the question of majority support, and will often be entirely consistent with continued employee desires for union representation. *NLRB v. Koenig Iron Works*, 681 F.2d 130, 138 (2d Cir. 1982). Ferguson testified that he told Loy that he did not "need no representation." He did not state that he did not want the Union to represent him. Marcos Falcon, who spoke with Loy shortly after signing the card presented to him, said nothing about the card. Although Marcos Falcon was working at M&M, Loy testified that he commented that he was "not satisfied" with the Union because the Union had "no place . . . to put him to work." Neither of the foregoing statements expressed "opposition to continued representation." *Rockwood & Co.*, 281 NLRB 862 fn. 30 (1986). Neither Falcon nor Ferguson, indeed, none of the employees, sought to have the authorization cards that they had signed returned to them.

In March, Loy mentioned no names when referring to the Union's purported lack of a majority, and Miley recalls none. On April 4, Miley signed the Recognition Agreement. There is no evidence of any further conversation between Miley and Loy regarding union representation prior to August 1. Thus, there is no basis upon which the Respondent could conclude that a majority of its unit employees did not desire representation. As of June 30, Joe Spear, Chris Sanchez, and Alex Rohling had ceased employment and Isaias Ocasio had been hired. The unit numbered 15. There is no evidence that a majority of those employees did not desire continued representation. Isaias Ocasio was dissatisfied with Local 925, not Local 487 and Loy never spoke to him regarding the Union. There is no evidence of any dissatisfaction, much less opposition to representation, on the part of employees Phil Gambill, Bob Leininger, Tommy Miliano, Lon Chatman, and Eddie Falcon. I have not credited Loy's testimony that each employee who expressed some dissatisfaction with the Union also stated that he did not want to be represented, and I have found that neither Marcos Falcon nor Ferguson expressed "opposition to continued representation." Thus, I find that the Union continued to represent a majority of the unit employees. There is no probative evidence that the Respondent possessed any objective evidence establishing that a majority of its employees did not desire continued union representation, and there is no evidence of any conversation between Miley and Loy after March in which the Union's majority status was either discussed or questioned.

As already noted, there is a dispute regarding what was said in the conversation between Business Manager Waters and the local attorney on July 8. Even if the attorney informed Waters that Miley was "through with negotiations," there is no contention that he stated that the Respondent was withdrawing recognition from the Union or that the Respondent disputed that a majority of its employees had authorized the Union to represent them.

On August 1, more than four months after the employees had signed authorization cards, Loy admits that he went to "each and every operator, I didn't exclude anyone, and asked if they wanted to sign this form." He recalls that all but four employees signed the identical copied form that he presented to them.

The form, in pertinent part, states:

> … I WISH TO RETRACT ANY CARD TAT [SIC] I MAY HAVE SIGNED WITH OPERATING ENG. LCL. 487. …
>
> I, THE EMPLOYEE OF M&M BACKHOE SERVICE, INC. DO REQUEST THAT THE COMPANY (M&M) DOES NOT BARGAIN WITH LCL 487 AS THEY DO NOT REPRESENT MY BARGAINING RIGHT.

Loy's actions confirm that the Respondent was fully aware that its employees had authorized the Union to represent them and that the Respondent had recognized, and was obligated to bargain with, the Union. Although Loy denied that he was responsible for the language on the form, his circulation of the form retracting "any card" confirms that the Respondent knew that a majority of its employees had signed and had not revoked cards that authorized the Union to represent them. Supervisory involvement in the solicitation of petitions expressing disaffection with a union taints those expressions of disaffection. *Exxel-Atmos, Inc.*, 323 NLRB 884, 886 (1997). Prior to August 1, there was no objective evidence that a majority of the unit employees did not desire representation. The evidence obtained on August 1 was tainted. The forms were solicited by a supervisor and followed the Company's failure to provide requested information and unilateral changes in the employees' working conditions.

The Company's letter of August 29 in which it refused to provide requested information because it was "the Company's position that it would be a violation of Section 8(a)(2) and 301(c)" of the Act to do so constituted withdrawal of recognition from, and refusal to bargain with, the employees' 9(a) collective-bargaining representative and violated Section 8(a)(5) of the Act.

2. The 8(a)(1) allegations

Employee Tommy Miliano testified that Loy approached him and stated that the Company "was going to offer the paid vacation, the paid holidays," "if I wanted to go non-Union, that's . . . the benefits I would get," and then handed him a document. Miliano read the document and understood that, if he signed it, he would be "giving up my bargaining rights." Miliano declined to sign the document and informed Loy that he was "going to stay Union." Loy then noted that there was no sense in carrying the "conversation on any further [a]nd that I'd probably be out of a job in a couple of days [a]nd good luck."

In late July, after the Company had hired employees not referred by the Union, ceased paying overtime for work over 8 hours in a day as provided in the contract, and ceased making contributions to the health and welfare plan, Loy was approached by employees Dennis Coates, Danny Collins, and Frank Ocasio. Coates recalled that they informed him that they "weren't happy with the Union." Loy informed the employees that "probably the best way to state our feelings" was to write a letter. Each wrote a letter. According to Loy, the letter written by Ocasio was unintelligible. Loy concluded that it was "fruitless for them to go to these extremes" and, therefore, he took the letter that had been written by Danny Collins, the document noted above in which the signer stated that he wished "TO RETRACT ANY CARD" and requested that the Company "NOT BARGAIN WITH LCL 487," had Office Manager Pfrenger type it and made enough copies for each operator to have one. On the following morning, August 1, Loy admits that he went to "each and every operator . . . and asked if they wanted to sign this form."

The complaint alleges that Loy promised benefits to employees, including insurance benefits, paid vacation, and holidays, if they withdrew their support for the Union and threatened employees with discharge because of their union support. Loy admitted presenting the foregoing form to Miliano, but he denied having any further conversation with him. I credit Miliano. The Respondent argues that Loy simply advised an employee of the benefits extended to nonunit employees. Miliano's credible testimony establishes that Loy's recitation of benefits was conditioned upon repudiation of representation by the Union. When Miliano responded that he would continue to support the Union, Loy threatened him with termination, stating that he would "probably be out of a job in a couple of days."

The complaint also alleges that Loy solicited employees to sign a petition requesting that the Company withdraw its recognition of the Union, and Loy admits circulating the foregoing form. The Respondent argues that Miley was unaware of Loy's actions, but that is not relevant. The Respondent cannot inconsistently maintain that expressions of dissatisfaction with the Union expressed to Superintendent Loy, admitted in the Respondent's answer to be a supervisor and agent, establish absence of majority status, but that his circulation of a petition disavowing the Union do not constitute actions of the Respondent. The Respondent violated Section 8(a)(1) by promising benefits, threatening termination, and soliciting employees to sign a petition requesting that the Respondent withdraw its recognition of the Union.

The final 8(a)(1) allegation is that President Miley engaged in surveillance. As hereinafter discussed, the Union engaged in a strike from Monday, August 12, through Thursday, August 15. Pickets at the facility on the morning of August 13 included Business Representative Allbritton and employees Eddie Falcon, Tommy Miliano, and Phil Gambill. On that morning, Miley came to the picket line and took at least one photograph with a digital camera. Miley testified that he took a picture of one of the picket signs. There is no claim that the pickets were engaging in improper conduct. Although Miley claims to have been photographing a sign, not a person, his camera was obviously pointed towards the individual carrying the sign. Photographing lawful strike activity "inherently tends to coerce employee in the exercise of their statutory right to strike and picket. . . . So far as they [the striking employees] knew, Company had captured them on film and was keeping that film as part of its records." *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1047 (2001). Any argument suggesting lack of intimidation is obviated by the evidence that, shortly before this, Miley had presented disciplinary notices to Miliano and Gambill when they turned in their keys at the office. In the absence of any claim that the photograph was a predicate for legal action, such as an injunction, I find that the Respondent's photographing violated Section 8(a)(1) of the Act.

3. The 8(a)(3) allegations

On July 22, the Union filed the charge in Case 12–CA–22384 alleging that the employer had ceased using the hiring hall and failed to pay daily overtime. On July 29, the Union filed the charge in Case 12–CA–22404 alleging the failure of the Respondent to bargain or provide requested information. On Monday, August 12, the Union called a strike to protest the Company's unfair labor practices. On August 13, Waters wrote Miley identifying employees Eduardo Falcon, Phil Gambill, Tom Miliano, and Robert Leininger as being on strike and making an unconditional offer on their behalf to return to work on Friday, August 16. The letter was sent by facsimile at 6:50 a.m. Thereafter, also on August 13, the Union informed the Company that employee Luke Tease had joined the strike and would also return on August 16. This letter was sent by facsimile at 11:35 a.m. Falcon and Leininger honored the picket line at the main gate. Gambill and Miliano were operating equipment at jobsites on August 12.

Miliano was operating a backhoe in Hialeah for M&M at a jobsite for a company identified as Renew Restoration. While working, he observed an individual he identified as Eric begin picketing. Miliano called Business Manager Waters who informed him that if he wanted to stay Union he should honor the picket and, if he did not, to keep working. Miliano ceased work and secured his machine by placing an outrigger lock around the cylinder and locking it with a padlock. He informed the representative of Renew Restoration that he was honoring the picket and thereafter informed Office Manager Pfrenger that he had locked down the machine and was going home. Loy spoke with the representative of Renew Restoration who informed him that he did not need another operator and that he was going to let things "cool down." Loy confirmed that Miliano had properly secured the backhoe and "I felt comfortable in leaving the backhoe there another day."

Shop steward Gambill was working for M&M at a Florida Power & Light jobsite. He was picketed by Business Agent Scott Singer at 11 a.m. Upon being picketed, Gambill ceased work and advised the Florida Power & Light crew leader that he "had to stop working, there was a picket here." The crew leader signed Gambill's time sheet for the 4 hours that Gambill had worked. Gambill testified that his backhoe did not have an outrigger lock and he therefore disabled it by removing the ignition fuse and placing it in another slot. He testified that this was the same manner in which he disabled the machine when leaving it overnight. He acknowledged that he did not advise the Company that he was leaving the job because of the picket. Loy contends that the backhoe did have an outrigger lock and that it was not padlocked.

On the morning of August 13, Miliano and Gambill reported to the office to turn in their keys and equipment. Both were presented a reprimand letter dated August 12 that informed them that they were being suspended for one day for abandoning company equipment and failing to notify management that they were leaving the job. Both refused to sign the discipline and neither were suspended at that time because both were on strike.

A strike, by definition, is the withholding of labor. Employees who engage in a lawful strike are engaged in protected activity and may not be lawfully disciplined for conduct inherent in the act of striking, such as absence from work. See *Frick Co.*, 161 NLRB 1089 (1966), enfd. 397 F.2d 956 (3d Cir. 1968). Miliano had informed the Company that he was leaving the job. Loy admitted that Miliano had properly secured the equipment and that he was "comfortable" leaving it there. The Respondent, by reprimanding Miliano for abandoning equipment that Loy confirmed had been properly secured violated Section 8(a)(3) of the Act. Miliano obtained other employment during the strike and therefore never was suspended.

Employees who go on strike have an obligation to assure that the equipment they are leaving is secure. The Board has long held that employees who strike have "responsibility for the [employer's] property which might be damaged" as a result of their "sudden cessation of work." *Columbia Portland Cement Co.*, 294 NLRB 410, 422 (1989), citing *Marshall Car Wheel Co.*, 107 NLRB 314 (1953). If, as Gambill contends, he could not secure the backhoe because it did not have an outrigger lock, he was obligated to inform the Company that he had not secured the equipment in the traditional manner and explain the unconventional manner in which he had disabled the equipment. Gambill acknowledges that he did not contact the Company. If, as Loy contends, the backhoe was not properly padlocked, Gambill did not properly secure the machine. Either version compels the conclusion that Gambill was remiss, and I find that his 1-day suspension for abandonment of Company equipment was justified. I shall recommend that the allegation relating to Gambill's discipline be dismissed.

On August 16, when employee Eddie Falcon reported to work pursuant to the unconditional offer to return that had been made on his behalf by the Union, he was informed that he was being suspended for one day for unexcused absences. Falcon had been on strike and the Union had informed the Company that he was on strike. In disciplining Falcon for absences incurred in the course of his protected strike activity, the Respondent violated Section 8(a)(3) of the Act. See *Frick Co.*, supra.

CONCLUSIONS OF LAW

1. By promising benefits conditioned upon disavowal of the Union, threatening termination for continuing to support the Union, soliciting employees to sign a petition requesting that the Respondent withdraw its recognition of the Union, and photographing lawful strike activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By reprimanding and suspending employees for engaging in lawful strike activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By failing and refusing to recognize and withdrawing recognition from the Union, failing and refusing to provide the Union with relevant information, and changing the terms and conditions of unit employees without notice to and bargaining with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully disciplined employees, it must rescind that discipline and make Eddie Falcon whole for any loss of earnings and other benefits he suffered as a result of his suspension, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having failed and refused to provide the Union with requested relevant information, it must provide the current contract between the Company and Florida Power & Light, all information pertinent to 401(k) and health care plans provided to both bargaining unit employees and nonbargaining unit employees, and the names, addresses, and phone number of any and all newly hired employees engaged in the operation of equipment who were not referred by the Union together with their wage rates, fringe benefits, paid holidays, paid vacation and/or any other benefits or compensation being provided, or promised in the future. It appears that all requested information relating to employee discipline is part of the record of this proceeding, thus any order in that regard would be superfluous.

The Respondent, having unilaterally changed the manner in which it compensated employees for overtime, it must make all affected employees whole for any daily overtime work that was not compensated at time and one-half and any Saturday work that was not compensated at time and one half, plus interest.

In order to remedy the Respondent's unilateral cessation of utilization of the hiring hall, the Respondent must, pursuant to *J. E. Brown Electric*, 315 NLRB 620 (1994), offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union were it not for the Respondent's unlawful conduct, and make them whole for any losses suffered by reason of the Respondent's failure to hire them. Reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. Id. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, plus interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent violated Section 8(a)(1) and (5) by unilaterally ceasing, since July 1, 2002, to make health and welfare contributions, the Respondent must make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make those contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent has violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, the Respondent must recognize the Union and bargain with it in good faith as the exclusive collective-bargaining representative of the unit employees, and, if an understanding is reached, to embody the understanding in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, M&M Backhoe Service, Inc., Homestead, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with, and withdrawing recognition from International Union of Operating Engineers Local 487, AFL–CIO.

(b) Unilaterally ceasing to pay daily and Saturday overtime.

(c) Unilaterally failing and refusing to use the Union's hiring hall to hire employees.

(d) Unilaterally ceasing to pay health and welfare benefits on behalf of unit employees.

(e) Failing and refusing to provide the Union with requested relevant information.

(f) Promising employees benefits if they withdraw their support from the Union and threatening employees with termination for continuing to support the Union.

(g) Soliciting employees to sign a petition requesting that the Respondent withdraw its recognition of the Union.

(h) Photographing lawful strike activity.

(i) Reprimanding and suspending employees for engaging in lawful strike activity.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive representative of the employees in the following appropriate unit and, on request, bargain with the Union concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Equipment Operators, Oilers, Drivers and Equipment Mechanics employed by the Employer in the counties of Broward, Charlotte, Collier, Miami-Dade, Glades, Hendry, Highlands, Indian River, Lee, Martin, Okeechobee, Palm Beach and St. Lucie, Florida; excluding all other employees, guards and supervisors as defined in the Act.

(b) Make whole all affected employees for any losses they incurred as a result of the unilateral change in the manner in which the Respondent compensated overtime with interest as set forth in the remedy section of the decision.

(c) Offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union were it not for the Respondent's unlawful conduct, and make

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

them whole for any losses suffered by reason of the Respondent's failure to hire them with interest as set forth in the remedy section of the decision.

(d) Make whole all unit employees by making all delinquent contributions to the health and welfare fund, including any additional amounts due the funds, and reimburse any affected unit employees for any expenses they incurred as a result of the failure to make those contributions, with interest, as set forth in the remedy section of the decision.

(e) Provide the Union with all requested relevant information as set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Tommy Miliano and Eddie Falcon and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.

(g) Make whole Eddie Falcon for any loss of earnings and other benefits that he suffered as a result of his unlawful suspension as set forth in the remedy section of the decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Homestead, Florida, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2002.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 10, 2003

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with International Union of Operating Engineers Local 487, AFL–CIO as your exclusive collective-bargaining representative in the following appropriate unit:

All full-time and regular part-time Equipment Operators, Oilers, Drivers and Equipment Mechanics employed by the Employer in the counties of Broward, Charlotte, Collier, Miami-Dade, Glades, Hendry, Highlands, Indian River, Lee, Martin, Okeechobee, Palm Beach and St. Lucie, Florida; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally cease to pay daily and Saturday overtime, and WE WILL make whole all of you for any losses you incurred as set forth in the remedy section of the decision.

WE WILL NOT unilaterally fail and refuse to use the Union's hiring hall to hire employees, and WE WILL offer immediate and full employment to those applicants who would have been referred to us were it not for our unlawful conduct, and make them whole for any losses suffered by reason of our failure to hire them as set forth in the remedy section of the decision.

WE WILL NOT unilaterally cease to pay health and welfare benefits on your behalf and WE WILL make you whole by making all delinquent contributions to the health and welfare fund, including any additional amounts due the funds, and WE WILL reimburse any of you for any expenses you incurred as a result of our failure to make those contributions as set forth in the remedy section of the decision

WE WILL NOT fail and refuse to provide the Union with requested relevant information, and WE WILL provide the Union with all requested relevant information as set forth in the remedy section of the decision

WE WILL NOT promise you benefits to persuade you to withdraw your support from the Union and WE WILL NOT threaten any of you with termination for continuing to support the Union.

WE WILL NOT solicit you to sign a petition requesting that we withdraw our recognition of the Union.

WE WILL NOT photograph lawful strike activity.

WE WILL NOT reprimand or suspend any of you for engaging in lawful strike activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL recognize the Union and, on request, bargain with the Union concerning your terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued to Tommy Miliano and Eddie Falcon and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL make whole Eddie Falcon for any loss of earnings and other benefits that he suffered as a result of his unlawful suspension as set forth in the remedy section of the decision.

M&M BACKHOE SERVICE, INC.